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It follows that the defendant having no rights, common-law or statutory, could by license confer none upon his co-defendants. The making of phonograph records of the song, therefore, clearly constituted an infringement of the plaintiff's common-law right to the first publication. The potential difference between the scope of this right and of those conferred by copyright laws becomes here apparent. The latter are limited and defined according to the terms and interpretation of the Act. Thus the reproduction of a song by mechanical devices has been held not to violate the exclusive right of printing and vending copies conferred by a statute.<sup>26</sup>

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CONFORMITY BY FEDERAL COURTS TO STATE PROCEDURE. REV. STAT., § 914.—In determining when under the Conformity Act the federal courts will follow the state procedure, the better course is to assume they will do so in all cases, unless the particular subject matter falls within some exception to the operation of the statute, and then to find what the exceptions are. The first limitation on the statute's operation is that imposed by the words of the statute itself. It is to apply only to civil causes, other than those in equity and admiralty,<sup>1</sup> which can be assimilated to some cause known to the practice of the state courts.<sup>2</sup> When such like cause is found the statute applies from the bringing of the writ<sup>3</sup> to the rendition of judgment,<sup>4</sup> irrespective of the fact that the cause

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also *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301, 302 (S. D. N. Y., 1914); WEIL, COPYRIGHT LAW, 393-396, 729-736.

<sup>26</sup> *Stern v. Rosey*, 17 App. D. C. 562 (1901). Cf. *White-Smith Pub. Co. v. Apollo Co.*, *supra*. See 19 HARV. L. REV. 134. However, the present federal statute makes the unauthorized reproduction of a song by mechanical devices an infringement of copyright. See 1916 U. S. COMP. STAT. ANN., § 9517 (e).

<sup>1</sup> Proceedings in equity and admiralty causes are governed by rules promulgated by the United States Supreme Court. See REV. STAT., § 917. See Equity Rules, 226 U. S. 629; Admiralty Rules, 254 U. S. 673. A state statute allowing equitable and legal causes to be combined will not be followed. *Scott v. Neeley*, 140 U. S. 106 (1891). Nor one allowing equitable defenses in actions at law. *Scott v. Armstrong*, 146 U. S. 499, 512 (1892); *Jewett Car Co. v. Kirkpatrick Constr. Co.*, 107 Fed. 622 (D. Ind., 1901). But equitable defenses may now be used in all federal courts. JUDICIAL CODE, § 274b. See 35 HARV. L. REV. 345. Nor do federal courts follow state practice in criminal proceedings. *Bryant v. United States*, 257 Fed. 378, 388 (5th Circ., 1919). Proceedings begun by attachment, to collect penalties, and to establish a will are civil causes within this statute. *Citizens' Bk. v. Farwell*, 56 Fed. 570 (8th Circ., 1893); *Atlantic, etc. R. Co. v. United States*, 168 Fed. 175 (4th Circ., 1909); *Sawyer v. White*, 122 Fed. 223, 227 (8th Circ., 1903).

<sup>2</sup> When no such analogy can be found, as in actions to confiscate property for the violation of revenue laws, the statute does not apply. *Coffey v. United States*, 117 U. S. 233 (1886); *United States v. Fourteen Pieces of Embroidery*, 155 Fed. 651 (E. D. N. Y., 1907).

<sup>3</sup> The substance of the writ is tested by the state practice. *Brown v. Chesapeake & Ohio Canal Co.*, 4 Fed. 770 (D. Md., 1880). The form of the writ is, however, governed by federal statute. See REV. STAT., § 911.

<sup>4</sup> See cases cited, note 19, *infra*. Execution and proceedings supplemental thereto are governed by federal statutes. See REV. STAT., §§ 915, 916. *Lamaster v. Keller*, 123 U. S. 376, 389 (1887); *Kaill v. Board of Directors*, 194 Fed. 73 (5th Circ., 1912). See *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 554 (1888). These statutes give remedies similar to those existing in the states, as of the time these statutes were passed. The Conformity Act contains no such limitation.

is founded on a federal<sup>5</sup> or state<sup>6</sup> statute. Its operation is then subject only to such limitations as the courts themselves have imposed in giving it its proper construction.

The first class of limitations that the courts have imposed arises from the nature of the federal courts themselves. With the exception of the United States Supreme Court they have no existence apart from Acts of Congress.<sup>7</sup> They have only that jurisdiction which is given to them by these Acts, and those powers which arise by necessary implication from the fact of their creation.<sup>8</sup> Hence they cannot follow a state practice which would change the limits of their jurisdiction,<sup>9</sup> nor one which conflicts with a federal procedural statute.<sup>10</sup> Furthermore, the Constitution and federal substantive statutes are binding on the federal courts and they cannot conform to a state practice when the result would be to deprive a litigant of the benefit of any Constitutional guarantee<sup>11</sup> or right created by Act of Congress.<sup>12</sup>

The second class of limitations arises from the nature and purpose of the statute. Its object was to protect litigants whose legal advisers had been trained in anticipation of practice under a code of procedure

<sup>5</sup> *Atlantic, etc. R. Co. v. United States*, note 1, *supra*; *Broadmoor Land Co. v. Curr*, 142 Fed. 421 (8th Circ., 1905). See *Luxton v. North River Bridge Co.*, 147 U. S. 337 (1893).

<sup>6</sup> *See Security Trust Co. v. Black River Nat. Bk.*, note 9, *infra*.

<sup>7</sup> See CONSTITUTION OF THE UNITED STATES, Art. III, §§ 1, 2. Legislation is necessary to give effect to this article. *Mutual Ins. Co. v. Champlin*, 21 Fed. 85, 89 (S. D. N. Y., 1884); *Turner v. Bank of North America*, 4 Dall. (U. S.) 8, 10 n. (1799).

<sup>8</sup> The primary source of jurisdiction of the inferior federal courts is of course found in the Constitution, but it is conferred subject to such restrictions as Congress shall prescribe. *Bankers Trust Co. v. Texas, etc. R. Co.*, 241 U. S. 295 (1916). This cannot be altered by state statute. *Bronson v. Schulten*, 104 U. S. 410, 417 (1881).

<sup>9</sup> The jurisdiction cannot be enlarged. *Cain v. Publishing Co.*, 232 U. S. 124 (1914); *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 442 (1910); *Goldey v. Morning News*, 156 U. S. 518 (1895). Nor can a state limit the jurisdiction of the federal courts by providing that when a cause of action is founded on a state statute the remedy shall be restricted to the state courts. See *Security Trust Co. v. Black River Nat. Bk.*, 187 U. S. 211, 227 (1902). Though the federal courts are courts of limited jurisdiction they are not courts of inferior jurisdiction. *M'Cormick v. Sullivan*, 10 Wheat. (U. S.) 192, 199 (1825).

<sup>10</sup> *Mexican, etc. Ry. Co. v. Duthie*, 189 U. S. 76 (1903) (amendment); *Chappell v. United States*, 160 U. S. 499, 513 (1896) (manner of trial in condemnation proceedings); *Southern Pac. Co. v. Denton*, 146 U. S. 202, 208 (1892) (district in which actions shall be brought); *Silvas v. Arizona Copper Co.*, 213 Fed. 504 (D. Ariz., 1914) (security for costs). Expressions are to be found to the effect that the Conformity Act applies only in the absence of direct legislation by Congress on a given subject. See *Berry v. Mobile & O. R. Co.*, 228 Fed. 395, 397 (W. D. Ky., 1915). A *dictum* in a recent case takes a more liberal view with respect to allowing amendments, in saying that in spite of provision by Congress for amendments, if the state practice is the more liberal, by force of the Conformity Act it will be followed, so long as this action is not negatived by federal statute. See *Minus v. Reid*, 275 Fed. 177, 179 (4th Circ., 1921). See *Norton v. City of Dover*, 14 Fed. 106 (D. N. H., 1882). But state statutes cannot restrict the power to grant amendments. *Lange v. Union Pac. R. Co.*, 126 Fed. 338 (8th Circ., 1903).

<sup>11</sup> *Slocum v. Ins. Co.*, 228 U. S. 364, 376 (1913).

<sup>12</sup> *Hills & Co. v. Hoover*, 220 U. S. 329 (1911). See *Luxton v. North River Bridge Co.*, note 5, *supra*, at 338. The same principle applies when to conform would deprive a party of a right guaranteed by a treaty. *Harkness v. Hyde*, 98 U. S. 476 (1878). Or where it would in effect deprive a party of a right of review. *Mexican, etc. Ry. Co. v. Pinkney*, 149 U. S. 194 (1893).

or practice act, from the pitfalls of the federal mode of procedure then in force, and to secure to all litigants a fair trial.<sup>13</sup> Once the issues in the case were fairly before the court, the object of the statute was largely attained.<sup>14</sup> In view of this the statute by its terms applies only to circuit and district courts.<sup>15</sup> It does not control the manner of obtaining a review<sup>16</sup> nor appellate proceedings.<sup>17</sup> Nor does it govern the administration of the trial by the judge, but on the contrary his common-law powers are not to be encroached upon and the trial is to be conducted as his discretion shall direct.<sup>18</sup>

In spite of the far-reaching effect of these two classes of limitations

<sup>13</sup> See *Nudd v. Burrows*, 91 U. S. 426, 441 (1875).

<sup>14</sup> This object has largely been attained by such rulings as that the federal courts must conform to the state practice as to forms of action. *Scranton v. Wheeler*, 179 U. S. 141 (1900). The single exception to this is that in federal courts a writ of *mandamus* can be brought only to aid a judgment. *Chickaming v. Carpenter*, 106 U. S. 663, 665 (1882); *Davenport v. County of Dodge*, 105 U. S. 237, 242 (1881). So too the sufficiency of the pleadings is to be tested by the state practice. *Glenn v. Sumner*, 132 U. S. 152 (1889); *United States v. Atlantic, etc. R. Co.*, 153 Fed. 918 (E. D. N. C., 1907); aff'd., 168 Fed. 175 (4th Circ., 1909). But where state practice allowed an action in the nature of ejectment to be founded on a purely equitable title the federal courts did not conform. *Beatty v. Wilson*, 161 Fed. 453 (D. Kan., 1908). Nor can defenses, equitable in nature, be used in federal courts by virtue of the Conformity Act. See note 1, *supra*. The scope of the pleadings is also to be tested by the state practice. *Glenn v. Sumner, supra*; *Chemung Canal Bk. v. Lowery*, 93 U. S. 72 (1876) (Statute of Limitations taken advantage of by demurrer); *Cole v. Carson*, 153 Fed. 278 (8th Circ., 1907) (matter put in issue by general denial). Hence when a case is removed from the state to the federal courts it is not necessary to file new pleadings. See *West v. Smith*, 101 U. S. 263, 264 (1879). The manner of challenging the summons, and the jurisdiction, is not, however, governed by state practice. *Meisukas v. Greenough Coal Co.*, 244 U. S. 54, 57 (1917).

<sup>15</sup> Since the passage of the Conformity Act the circuit courts have been done away with. See JUDICIAL CODE, § 289. Their functions are now performed by the district courts. See JUDICIAL CODE, § 291.

<sup>16</sup> It would seem that unfamiliarity with federal procedure as to obtaining a review would be just as prevalent, and would prejudice a litigant as much as unfamiliarity with any other step in the proceedings. It is, however, well established that the Conformity Act does not apply here. *Fishburn v. Chicago, etc. R. Co.*, 137 U. S. 60 (1890) (bill of exceptions); *Chicago Life Ins. Co. v. Tiernan*, 263 Fed. 325, 330 (8th Circ., 1920) (motion for a new trial not a condition precedent to a review); *McBride v. Neal*, 214 Fed. 966 (7th Circ., 1914) (writ of error).

<sup>17</sup> Appellate proceedings are governed entirely by acts of Congress, the common law, and ancient English statutes. *Camp v. Gress*, 250 U. S. 308, 317 (1919); *McKeon v. Central Stamping Co.*, 264 Fed. 385 (3d Circ., 1920).

<sup>18</sup> State statutes providing that the trial judge shall not comment on the facts, that instructions must be in writing, and be taken with the jury to the jury room, or that papers read in evidence may be taken to the jury room need not be followed. *Nudd v. Burrows*, 91 U. S. 426 (1875). Nor a statute that the judge shall require the jury to make special findings. *Accident Assn. v. Barry*, 131 U. S. 100 (1889); *Indianapolis, etc. R. Co. v. Horst*, 93 U. S. 291, 299 (1876). Nor one governing the charging of the jury. *Lincoln v. Power*, 151 U. S. 436, 442 (1894). See *United States v. Oppenheim*, 228 Fed. 220, 228 (N. D. N. Y., 1915). Likewise the disposition of a case by granting a new trial is within the judge's discretion. *Newcomb v. Wood*, 97 U. S. 581, 583 (1878); *Missouri Pacific Ry. v. Chicago, etc. Ry. Co.*, 132 U. S. 191 (1889). Since these matters are in the court's discretion, and since the rulings which will be made on them will be made when both counsel are present, so that misunderstandings can at once be corrected, there is much more basis for holding that here the statute shall not apply, than there is in the case of methods of obtaining a review. See note 16, *supra*.

there is still a considerable field for the statute's application.<sup>19</sup> But even within this field the courts are not absolutely bound to follow the state practice.<sup>20</sup> They need not conform in matters of detail,<sup>21</sup> nor where to do so would tend to hamper the administration of justice.<sup>22</sup> What are minor details and what will impede the course of justice the cases do not say. The latter question is essentially one of fact and each case calling for its determination will be unique.<sup>23</sup> Furthermore, there is no way of knowing beforehand what the determination will be. It is not as though the court in deciding must choose the most expeditious rule that is known to either the state or federal practice, for if it likes

<sup>19</sup> Federal courts have conformed to state practice in the following instances: Test for the sufficiency of the writ. *Brown v. Chesapeake, etc. Co.*, note 3, *supra*. Indorsement of summons. *United States v. Rose*, 14 Fed. 681 (S. D. N. Y., 1882). Mode of service of process. *Amy v. Watertown* (No. 1), 130 U. S. 301 (1889). Validity of service. *McCullough v. United Grocers' Corp.*, 247 Fed. 880 (N. D. Ohio, 1918). Right of an assignee to sue in his own name. *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488 (1890). Cf. *New York, etc. Co. v. City of Sullivan*, 111 Fed. 179 (D. Ind., 1901). Capacity of parties. See *Albany, etc. Co. v. Lundberg*, 121 U. S. 451, 453 (1887). Joinder of parties. *Delaware County v. Safe Co.*, *supra*. Joinder of causes of action. *Quirk v. Bank of Commerce*, 244 Fed. 682, 687 (6th Circ., 1917). Joinder of defenses. *Cole v. Carson*, note 14, *supra*. See *Southern Pac. Co. v. Denton*, note 10, *supra*. Pleadings. See note 14, *supra*. Pleadings as admissions. *Northern Pac. R. v. Paine*, 119 U. S. 561 (1887). Notice of time of trial. *Rosenbach v. Dreyfuss*, 2 Fed. 23 (S. D. N. Y., 1880). Compulsory nonsuit. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24 (1891). Directed verdict. See *Barrett v. Virginian Ry. Co.*, 250 U. S. 473 (1919). Voluntary nonsuit. *Barrett v. Virginian Ry. Co.*, *supra* (reversing the court below and overruling several prior lower court decisions); *Alsop v. McCombs*, 253 Fed. 949 (8th Circ., 1918). Validity of the verdict. *Bond v. Dustin*, 112 U. S. 604 (1884). Form and effect of the verdict. *Glenn v. Sumner*, note 14, *supra*. Manner of entering judgment. *Sawin v. Kenny*, 93 U. S. 289 (1876). Assessment of damages after judgment by default. *Loewe v. Union Savings Bank*, 226 Fed. 294 (D. Conn., 1915). State statute that pleadings shall be liberally construed. *United States v. Parker*, 120 U. S. 89 (1887). This list is not exhaustive.

<sup>20</sup> They have refused to do so with regard to the following matters: Service of process. *Shepard v. Adams*, note 27, *infra*. Return of writ. *Mechanical Appliance Co. v. Castleman*, note 9, *supra*; *Boston, etc. R. Co. v. Gokey*, note 22, *infra*. Return day. *United States v. U. S. Fidelity, etc. Co.*, note 25, *infra*. Effect of a special appearance. *Southern Pac. Co. v. Denton*, note 10, *supra*. Method of objection to the jurisdiction. *Meisukas v. Greenough Coal Co.*, note 14, *supra*. Statutory right to change venue. *Kennon v. Gilmer*, 131 U. S. 22 (1889). Form of pleadings. *Elk Garden Co. v. Thayer Co.*, note 22, *infra*; *Hein v. Westinghouse, etc. Co.*, note 30, *infra*. Notice as to proposed amendment. *Lange v. Union Pac. R. Co.*, note 10, *supra*. Equitable defenses. See note 1, *supra*. Granting continuances. *Texas & Pac. R. Co. v. Nelson*, 50 Fed. 814 (5th Circ., 1892). Conduct of trial and motions for new trial. See note 18, *supra*. Special juries. *Chappell v. United States*, note 10, *supra*. Validity of the verdict. *City of St. Charles v. Stookey*, 154 Fed. 772, 778 (8th Circ., 1907). Judicial interpretation of the common law. *Mahr v. Union Pac. R. Co.*, note 27, *infra*; *Wall v. C. & O. Ry. Co.*, 95 Fed. 398 (7th Circ., 1899). Waiver of illegality or error in the proceedings by continuation of the proceedings. See note 23, *infra*. This enumeration is not exhaustive. It does not include matters covered by federal statutes.

<sup>21</sup> *Indianapolis etc. R. Co. v. Horst*, note 18, *supra*, 300; *Van Doren v. Penn. R. Co.*, 93 Fed. 260 (3d Circ., 1899).

<sup>22</sup> *Boston, etc. R. Co. v. Gokey*, 210 U. S. 155 (1908); *Elk Garden Co. v. Thayer Co.*, 206 Fed. 212 (W. D. Va., 1913).

<sup>23</sup> In only one class of cases do the federal courts seem definitely to refuse to follow the state practice, because according to their lights to do so would work an injustice. Where a state statute provides that whenever a party, after exception taken, does not at once seek a review but goes on with the proceedings below, he waives any matter, illegal or erroneous, which would have formed the basis of an appeal, it is disregarded

none of these it is authorized to make an entirely new rule.<sup>24</sup> The fact that the federal courts have once followed the state practice in any given matter does not mean that they must continue to do so, and if the state practice is changed it does not necessarily mean that the federal courts will change their practice to conform.<sup>25</sup> It is interesting to note on this score that practically all appellate decisions which would seem to indicate where state practice is to be followed and where it is not to be followed are decisions affirming the trial court's action.<sup>26</sup> The net result is that in this field the question of conformity is largely within the discretion of the trial judge.<sup>27</sup>

The statute has accomplished its main purpose. The general structure of the procedure of the various state courts has been made the foundation of the procedure of the federal courts sitting in these states.<sup>28</sup> But there is great uncertainty as to just when the federal courts will follow the state procedure.<sup>29</sup> This in itself is a constant source of annoyance if not of hardship. Moreover, the fact that every provision of a given state code of procedure must be followed, or if not followed its place taken by some rule of court,<sup>30</sup> means that procedure in the federal courts is subjected to the same detailed regulation as procedure in the state courts and prey to all the evils attaching to codes of procedure.<sup>31</sup> The solution is to replace the Conformity Act by a statute authorizing the Supreme Court of the United States to regulate the procedure of the federal courts in civil actions other than equity and admiralty causes, by general rules of court.<sup>32</sup>

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by the federal courts. *Harkness v. Hyde*, note 12, *supra*; *Sligo Furnace Co. v. Dalton*, 255 Fed. 532 (8th Circ., 1919); *Williamson v. Insurance Co.*, 141 Fed. 54, 59 (8th Circ., 1905).

<sup>24</sup> Federal courts are authorized to make such rules and orders as may be necessary to advance justice and prevent delay. See REV. STAT., § 918. The Conformity Act and this statute are to be construed together. *Osborn v. City of Detroit*, 28 Fed. 385 (E. D. Mich., 1886).

<sup>25</sup> Boston, etc. R. Co. v. Gokey, note 22, *supra*; *United States v. U. S. Fidelity, etc. Co.*, 186 Fed. 477 (3d Circ., 1911).

<sup>26</sup> See cases cited, notes 19 and 20, *supra*. It is hardly necessary to point out that the result of saying the lower court was justified because it did or did not follow the state practice, has not the same binding force as saying that the lower court was wrong and must be reversed because it did or did not follow the state practice.

<sup>27</sup> *Shepard v. Adams*, 168 U. S. 618 (1898); *Mahr v. Union Pac. R. Co.*, 140 Fed. 921 (E. D. Wash., 1905). See also cases cited, notes 19, 20, 21, and 22, *supra*. This result has been reached by emphasizing the words of the statute "as near as may be." See Indianapolis, etc. R. Co. v. Horst, note 18, *supra*, at 300.

<sup>28</sup> See cases cited, notes 14 and 19, *supra*.

<sup>29</sup> That there is uncertainty can readily be seen by a comparison of the cases cited in notes 19 and 20, *supra*. The courts themselves have recognized that there is no clear line of cleavage between the instances in which they conform to state practice and those in which they do not. See *De Valle Da Costa v. Southern Pac. Co.*, 167 Fed. 654, 657 (D. Mass., 1909).

<sup>30</sup> Nor need these rules be standing rules. See *Hein v. Westinghouse, etc. Co.*, 168 Fed. 766, 769 (N. D. Ill., 1909).

<sup>31</sup> See Roscoe Pound, "Regulation of Procedure by Rules of Court," 10 ILL. L. REV. 163.

<sup>32</sup> Steps have been taken to bring about such a reform. See Tentative Program and Committee Reports of the American Bar Association (Cincinnati, 1921), 167. The adoption of such a statute is adequately justified by the success of the Supreme Court "Equity Rules." See Wallace R. Lane, "Federal Equity Rules," 35 HARV. L. REV. 276.